IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 151

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

FRANK Y. GLADNEY,
JOHN H. CASSIDY,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. .....

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner, The Seven Up Company, prays that a writ of certiorari issue directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 12955, Civil, The Seven Up Company, Appellant, v. Cheer Up Sales Company of St. Louis, Missouri, a corporation, et al., Appellees, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States.

Your petitioner respectfully shows:

STATEMENT.

Petitioner filed its complaint in the United States District Court for the Eastern Judicial District of Missouri, (a) charging the infringement of its registered trade-mark *Seven Up*, or *7 Up;* (b) and unfair competition in dress or package, including said trade-mark; and (c) for cancellation of registration in the United States Patent Office of defendant Orange Smile Sirup Company.

A judgment of the District Court dismissing petitioner's complaint was affirmed by the Circuit Court of Appeals.

Petitioner's trade-mark is *Seven Up* (Reg. No. 252,350, R. 85), or *7 Up* (Reg. 331,345, R. 89). Respondent's accused mark is *Cheer Up* (Reg. No. 340,923, R. 95).

Marks of both parties are used on the same goods, a carbonated beverage or soft drink and extracts and ingredients therefor. The beverages are substantially identical, both being lithiated lemon lime flavor.

Petitioner's bottle is exemplified by Plaintiff's Ex. 2, while respondents' accused bottle is exemplified by Plaintiff's Ex. 1; both bottles for convenience being illustrated by color photographs included in the Appendix hereto.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 26, 1945 (R. 553). Petition for rehearing, timely filed by petitioner (R. 567), was denied on May 15, 1945 (R. 569).

Jurisdiction of the District Court was invoked under the trade-mark laws of the United States, and more particularly United States Code, Title 15, §§ 97 and 102, and Title 28, § 41 (7). Since the charge of unfair competition

includes trade-mark infringement and there is substantially a single cause of action, jurisdiction of the federal court is supported by *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 325, 336.

Jurisdiction of this court is invoked under Sec. 240, as amended, of the judicial code, United States Code, Title 28, § 347 (a) and Title 15, § 98.

Statutes Involved.

The case involves an interpretation of the trade-mark laws of the United States and more particularly 15 U. S. C. 96, relating to infringement of trade-marks, and especially the words "reproduce, counterfeit, copy, or colorably imitate"; and 15 U. S. C. 102, relating to cancellation of registered marks, and especially the words "interfering registered trade-marks"; both sections being set out in the Appendix hereto.

Questions Presented.

A. Trade-Marks.

1. In the case of a registered mark comprised of two arbitrary words; is it permissible for a competitor to adopt and use on directly competitive goods, (a) a two-word mark consisting of the reproduction of one of such arbitrary words in conjunction with a substitute for the other, in manner and form so that (b) in the two marks the reproduced word occupies the same relative position?

2. Restating question 1 concretely and in terms of the record, is *Seven Up* or *7 Up* infringed by *Cheer Up?*

B. Unfair Competition.

3. In a comparison of the general appearance of two competing packages, each appearance being comprised of a complex combination of elements that taken severally

are old, is it allowable to break up the combination by isolating and disregarding the presence of the back-ground element of both combinations, because such element (not the combination) is in the public domain, and thereupon to ground the absence of confusing similarity on the combination as so disrupted?

4. Restating question 3 concretely and in terms of the record, does the use of respondents' bottle, exemplified by Plaintiff's Ex. 1, constitute unfair competition with petitioner's bottle, exemplified by Plaintiff's Ex. 2?

REASONS RELIED ON FOR GRANTING THE WRIT.

1. An important question of federal law, involving the interpretation of the said sections of the trade-mark statutes, has been decided which has not been but should be settled by this court.

2. The said federal question has been decided in a way probably in conflict with an applicable decision of this court, *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 33.

3. A question of local law, involving unfair competition, has been decided in a way probably in conflict with an applicable local decision, *McCann v. Anthony*, 21 Mo. App. 83.

Wherefore, petitioner respectfully submits its petition for writ of certiorari.

FRANK Y. GLADNEY,
JOHN H. CASSIDY,
407 North Eighth Street,
St. Louis 1, Missouri,
Counsel for Petitioner.